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IN THE

SUPREME COURT OF THE UNITED STATES.

No. 278.

ROCK ISLAND MOTOR TRANSIT COMPANY,
Petitioner,

vs.

CONDITIONED AIR CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the State of Iowa.

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To the Supreme Court of the State of Iowa.

Petitioner, Rock Island Motor Transit Company, an Illinois corporation, engaged in business as a certificated motor carrier of general commodities, seeks a review by this Court of the decision and judgment of the Supreme Court of the State of Iowa, involving the proper measure of its liability for damage to an interstate shipment, and as grounds therefor states:

(a) The opinion of the court below is unofficially reported as **Conditioned Air Corporation v. Rock Island Motor Transit Company**, 114 N. W. 2d 304, advance sheets

of May 2, 1962, not yet published in the official Iowa reports.

(b) 1. The judgment sought to be reviewed is dated April 3, 1962, and was entered on that date.

2. Timely petition for rehearing was filed by petitioner in the court below, and was denied May 8, 1962. No application for extension of time for filing this petition has been made.

3. Jurisdiction to review the judgment below is conferred upon this court by the Act of June 25, 1948, 62 Stat. 929; Title 28, Section 1257, U. S. Code Ann. The case is governed by par. 11, Sec. 20 of the Interstate Commerce Act.

(c) Respondent, an air conditioning contractor, sued petitioner for damages to aluminum panels and building trim, shipped from Indianapolis, Ind. to it at Des Moines, Iowa. Petitioner, the delivering carrier, is made liable by Sec. 20 (Par. 11) of the Interstate Commerce Act for the full loss, damage or injury to property in transit. Respondent replaced the damaged panels at a cost to it for all labor and materials including social security and unemployment taxes, workmen's compensation insurance, and contributions to union welfare funds of $5,462.11.

Neither petitioner, nor its connecting carrier, was notified that the panels and trim were the subject of a sale, or, if replacement of some panels became necessary, differences in color would occur between the panels originally shipped and replacements, which would be the basis of claims for breach of contract against respondent. Notwithstanding this lack, the trial court, over petitioner's objections, received evidence that respondent granted a discount of $1,250 in its contract price to its purchaser, solely because of differences in color between the panels shipped and the replacements.

The trial court also received in evidence, over objections of petitioner, an accountant's audit of respondent's business for the years 1959 (year of shipment) and 1958, disclosing respondent's overhead cost of doing business, including executives' salaries and expenses, rent of buildings, depreciation, clerical hire, insurance, professional fees, outside engineering services, telephone, telegraph, automobile and travel expense, and similar items, amounted to 22½ per cent of its total direct job costs in 1959, and 17 per cent in 1958. Although requested to eliminate these items as not recoverable damages, the trial court included the discount of $1,250 and $928.56 for overhead expense in its judgment. These rulings were approved, and the judgment was affirmed by the Supreme Court of Iowa.

The questions presented by this petition may be stated as:

Do Section 20 (11) Interstate Commerce Act and the common law, as recognized and applied in the federal courts, authorize recovery of discounts, granted by a consignee of property lost or damaged in transit to a purchaser, because of differences in color between the property shipped and replacements, when no notice of the existence of a sales contract, or the probability of loss to consignee in addition to the actual cost of replacement, was given to the carrier?

Do the statute and the common law, in cases of loss or damage in transit, authorize a consignee to recover from a carrier, not only the cost of replacing damaged articles, but also a pro rata portion of overhead costs, such as executives' salaries and expenses, rental of buildings, clerical hire, depreciation, insurance, professional fees, outside engineering service, telephone, telegraph, automobile and travel expense, and similar items, not incurred or increased by the necessity for the replacement?

(d) Section 20, Par. 11 of the Interstate Commerce Act provides:

"**Liability of initial and delivering carrier for loss; limitation of liability; notice and filing of claim.** Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory, or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such

> property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; • • •"

(e) **Statement of the Case.** Petitioner is an interstate common carrier by motor vehicle, and respondent's principal business is the installation and servicing of air conditioning equipment. It also fabricates sheet metals as a contractor. Its petition, or complaint, in the trial court, alleged it was the owner of certain aluminum panels and building trim shipped to it at Des Moines, Iowa, from Indianapolis, Indiana, via Daum Freight Lines and petitioner's truck line, portions of which were damaged in transit. By amendment to its complaint, it alleged that

> "despite due diligence it was unable to fully replace or repair said panels and trim in that the coloring thereof could not be duplicated, all to plaintiff's **special damage** in the amount of $1,750."

Before trial, petitioner admitted liability for the cost of replacement of eighty-six panels, denied damage to others, and offered to confess judgment for a substantial sum, but contested the extent of respondent's damage. Upon conflicting evidence, the trial court found that 153 panels were damaged so as to require replacement, and respondent was entitled to the following items as damages:

Replacement materials purchased	$2,840.31
Crating materials for shipping replaced panels to Indianapolis and return	99.46
Freight on replaced panels and return	363.53
Anodizing charge of Colors, Inc, at Indianapolis, plus C. O. D. fee	835.18
Actual labor cost in processing replacement panels	1,198.90
Unemployment and social security taxes, workmen's compensation insurance, and contribution to Union Welfare Fund, 10 per cent of labor cost	119.89
Fair and reasonable overhead charges for use of machinery, rent, management salaries, etc., in the reasonable sum of 17 per cent of above items	928.56
Loss on account of changes in color of panels	1,250.00

(See Record pp. 89, lines 28-34, inc. and 90, lines 1-17, inc., 91, lines 24-34, inc., 92, lines 1-6, inc. and Appendix 2, p. 50, par. 6, to p. 51, par. 11, and p. 52, par. 3.)

This case involves the last two items listed. On appeal, the highest Iowa court, after stating the facts, said:

> "As the parties agree, liability for damage to this interstate shipment is governed by subparagraph 11, Sec. 20, U. S. C. A. Defendant is liable according to the statute 'for the full actual loss, damage or injury to such property caused by it.'"

Following this, the Court discussed the general rule of difference in market value of the property at destination "if it had not been injured, and such value in its injured condition." The Court then quoted from the **Restatement, Torts, Sec. 928**, to the effect that the cost of repairing a

damaged chattel "with due allowance for any difference between the original value and value after repairs" might be applied at plaintiffs election. Continuing, the Court said:

> "We think the rule from the Restatement may properly be applied here and that it supports allowance to plaintiff of the $1,250. Unless this sum is included in the award to plaintiff it will not be reimbursed for 'its full actual loss' as the statute contemplates."

The Court then said that the fact that respondent was required to accept $1,250 less than its full contract price because the replaced panels did not match in color those shipped was evidence that the replaced panels were not of the same value as those originally shipped. In support of this conclusion, the Court cited authorities holding that proof that damaged goods were sold at the best obtainable price is some evidence of actual or market value. With respect to petitioner's contention that the $1,250 discount was an item of "special damages," for which no recovery could be had in the absence of notice of the circumstances to the carrier, the Iowa Court said:

> "The general rule is that special damages are not recoverable from a carrier for injury to goods shipped unless it had notice or knowledge of the special circumstances from which such damages would flow. Percy v. Chicago, R. I. & P. R. Co., 207 Iowa 889, 892-4, 223 N. W. 879; Alfon R. Co. v. Oklahoma Furniture Mfg. Co., 190 Okla. 216, 122 P. 2d 152, 166 A. L. R. 1030, 1032 and Anno. 1034; 13 C. J. S., Carriers, Section 267; 9 Am. Jur., Carriers, Section 789. There is no evidence defendant was informed at the time of the original shipment, of the purpose for which the panels were to be used.

"However, we are not persuaded the item of $1,250 constitutes special damages within the above rule. Certainly the difference between the value of the original shipment if it had not been injured and the value in its injured condition would constitute general, not special damages. And we think, in lieu thereof, the reasonable cost of restoring the injured panels, with due allowance for the difference between their original value and the value after restoration, also constitutes general, not special, damages. As stated, defendant concedes liability for the cost of restoration. We are cited to no authority for the proposition that depreciation in value of the restored goods constitutes special damages which are not allowable in the absence of notice."

(See Appendix 1, pp. 28 and 29.)

The Iowa Court also sustained the action of the trial court in receiving in evidence the accountant's audit of respondent's business for the years 1959 and 1958, saying:

"We think defendant's liability for plaintiff's 'full actual loss,' which the federal statute contemplates, includes not only the direct cost of labor and materials in replacing the injured panels, which is concededly due, but also a fair allowance for the cost of furnishing officers and supervisors, buildings, machinery, and power and other items of operation and overhead. There is substantial evidence to support the amount of the trial court's allowance for these items if the plaintiff is entitled to any recovery therefor."

(The substantial evidence referred to was the accountant's audit.)

(f) As already pointed out the parties before trial agreed that the case was governed by Sec. 20 (11) of the

Interstate Commerce Act. The opinion of the Iowa Supreme Court recites that the parties were in agreement in this respect.

The making of the shipment, ownership of the aluminum panels, issuance of a bill of lading by the initial carrier and the manner of packing and crating the shipment were stipulated by the parties, as was the fact that some damage to the shipment occurred in transit. The contested issues were (a) extent of the damage, (b) the measure of damages to be applied, and (c) admissibility of evidence as to a discount allowed by respondent to its purchaser because the replaced panels failed to match the color of those undamaged in the original shipment.

With respect to the discount of $1250 allowed by respondent to its vendee, when inquiry was first made on this subject, counsel for petitioner objected "as immaterial and incompetent, no bearing on any issue before the court, not the proper measure of damages, and no foundation laid for any claim of that type or character" (Record, pg. 23, lines 24-29, inc., and Appendix 2, pg. 43 and 44).

By agreement between counsel and the trial court, the objections were made applicable to any inquiries with respect to Exhibit G, or any settlement with the contractor vendee (Record 24, and Appendix 2, pg. 44).

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

1. The Supreme Court of Iowa has construed the provisions of Sec. 20 (11), Interstate Commerce Act, which make petitioner, as the delivering carrier, liable for the full loss, damage or injury to property transported over lines of other carriers, liable also for special or consequential damages to the owner of property transported, even

in the absence of notice, contrary to the rules of the common law and the provisions of the statute.

2. The Iowa Supreme Court has decided important questions of Federal law in a manner directly contrary to an applicable decision of this court in Illinois Central Railroad Co. v. Crail, 281 U. S. 57, 74 L. Ed. 699, and has thus created confusion and uncertainty as to the proper construction and application of the Carmack and Cummins Amendments to the liability of carriers for damage to interstate shipments.

3. The Iowa Supreme Court has decided questions of Federal law of great importance to all shippers and receivers of freight and to carriers, in a way in conflict with applicable decisions of this Court, and of the Courts of Appeal for the various circuits, as well as contrary to accepted principles of the common law.

ARGUMENT.

The Statute.

Section 20 (11) of the Interstate Commerce Act, in its present form, makes both the initial and the delivering carrier responsible to the owner for "the full actual loss, damage, or injury to such property caused by it or by any such common carrier." Except for this modification, the common law with respect to the liability of a carrier for damage to shipments remains unchanged. It is important that all concerned bear in mind that the statute imposes no greater degree of liability upon a carrier than did the common law, except that both initial and delivering carrier are made liable to the owner for loss or damage in transit. The opinion of the court below broadens the liability of common carriers for purely remote, consequential, or **special damages** in a manner, and to an extent, not provided by the words of the statute.

The Discount Allowed.

The Iowa Supreme Court sustains the trial court in awarding respondent damages of $1,250 because the panels in the original shipment (153 of which the trial court found were damaged) did not match, in color those prepared by respondent to replace the panels damaged. The differences in color were due to variations in the process of anodizing the two lots. (Anodizing is a process of applying a thin coating of pure aluminum to the aluminum alloy panels, performed for both the original and replaced panels at Indianapolis, Indiana.)

The Iowa Court based its affirmance of the trial court on:

(a) The replaced panels did not have the same value to respondent as those damaged in shipment, and unless

compensated for the discount allowed to its purchaser, respondent "will not be reimbursed for its 'full actual loss' as the statute contemplates."

(b) Although recognizing the universal rule of the common law that carriers are not liable for "special damages," in the absence of notice of circumstances, the court ignored the rule by holding the $1,250 item of discount was not **special** but "general" damages. To support this clearly erroneous result, the court referred again to the discount granted as, in reality, a difference in value between the panels damaged in transit and those made up as replacements. The Iowa Court thus construed the statute so as to sustain the award of $1,250 discount as an item of "general" damages recoverable in every case of loss or damage, although it was due to special circumstances of respondent of which petitioner was not advised.

25 Corpus Juris Secundum, pp. 459 and 460, defines the term "special damages" as:

> "Special, as contradistinguished from general, damages are those which are the natural, but not necessary, consequence of the act complained of. They are such as actually result from the commission of the wrong, but are not such a necessary result that they will be implied by law, or will be deemed to have been within the contemplation of the parties.
>
> "Special damages always grow out of an unusual or peculiar state of facts, which may be known to one of the parties but not to the other, and follow the injury as a natural and proximate consequence in the particular case by reason of special circumstances or conditions.
>
> "In cases of tort it may be said that special damages are such consequences of an injury as are peculiar to the circumstances and conditions of the injured party."

As applied to a carrier's liability for loss or damage to property shipped, 13 Corpus Juris Secundum, par. 267, p. 619, says with respect to "special damages":

> "In an action for loss of, or injury to, goods shipped, only such damages are recoverable as were contemplated, or might reasonably have been contemplated, by the parties. To authorize a recovery of such damages as would not ordinarily flow from the loss or injury, it is essential that, at the time of shipment, the peculiar circumstances from which special damages would arise because of such loss or injury should be made known to the carrier."

The decisions of the Courts of Appeal for the various circuits support the statement quoted above. Thus the Court of Appeals for the Sixth Circuit in Ruggles v. Buffalo Foundry and Machine Company, 27 F. 2d 234, distinguished between general and special damages as:

> "The distinction between general and special damages is not that one is and the other is not the direct and proximate consequence of the breach complained of, but that general damages are such as naturally and ordinarily follow the breach, whereas special damages are those that ensue, not necessarily or ordinarily, but because of special circumstances."

And in Gardner, Trustee, v. Mid-Continent Grain Co., 168 F. 2d 819, the Court of Appeals for the Eighth Circuit in holding a railroad not liable for delay to a shipment of soybeans which had been previously wet, said:

> "While it usually is said that only such damages can be recovered for delay in transportation as may reasonably be regarded as having been within the contemplation of the parties at the time the contract of carriage was made, liability in relation to special circumstances has some times been recognized on the basis of notice to the carrier after the transportation has commenced. • • •

"In the present case, therefore, the failure of the carrier to have transported the soybeans to Kansas City before the expiration of the ten or twelve days' period, in which the court found that they would spoil because of their special condition, would not make the carrier liable for their spoiling (such as might perhaps be the situation generally in the case of perishable goods as a matter of contemplated damages) if the carrier had no notice of the special condition of the soybeans, so as to impose upon it a duty to act in relation thereto."

Additional authorities from state and federal courts might be cited to demonstrate that damage items, such as the discount allowed to respondent have universally been held recoverable, only upon a showing of advance notice to the carrier of the circumstances of the parties which would produce loss. The Iowa court disregarded the authorities in holding that the discount item of $1,250 was "general damages", and not "special damages." Thus, the Iowa court has reached an erroneous conclusion of law, in part by disregarding established rules of the common law, and in part by a construction of the statute; not justified by its terms and contrary to that adopted by this court in the case of Illinois Central Railroad Company v. Crail, 281 U. S. 57, 74 L. Ed. 699, wherein this court ruled that the measure of damages for loss of 5,500 lbs. from a carload of coal was the cost of replacement and no more. The case of Gardner v. Mid-Continent Grain Co., 168 F. 2d 819, clearly shows that had this case been decided in the United States Court of Appeals for the Eighth Circuit, a directly contrary result would have been reached. Neither the Interstate Commerce Act nor the common law imposes liability upon a carrier for such special, remote and consequential damages as were awarded by the highest Iowa court. This holding of the Iowa court makes remote and consequential damages sustained by a shipper

recoverable in the absence of notice to the carrier of special circumstances from which such damages will follow.

The "Overhead Expense" Claim.

As we have seen after computing all material, labor, transportation, anodizing, and other incidental costs incurred by respondent to replace the damaged panels, the trial court added 17 per cent of the total for

> "fair and reasonable overhead charges for the use of machinery, rent, management salaries, etc., in the sum of $928.56."

As we have seen, the Iowa Supreme Court sustained this award saying:

> "The full actual loss, which the federal statute contemplates, includes not only the direct cost of labor and materials in replacing the injured panels which is concededly due, but also a fair allowance for the cost of furnishing officers and supervisors, buildings, machinery, and power and other items of operation and overhead."

No attempt was made to show that any of the overhead expense items were incurred or increased by the necessity to replace the panels damaged. While respondent's president testified that the replacement required the time of supervisory employees, no record of which was kept, the accuracy of this statement was challenged by the evidence of the superintendent of respondent's sheet metal department who testified that much of the replacement work was done at night, when he was not present (Record, page 59, lines 13 to 20, inc.).

At the close of the evidence, petitioner's counsel requested the court to rule as a matter of law that the discount item of $1,750 (consisting of $1,250 for the school district, and $500 to the contractor, vendee, for extra

labor, not allowed by the trial court) "constitute special damages, and that the evidence is wholly insufficient to establish that defendant is in any manner liable for such loss" (Record, pg. 74, lines 19-27 and see Appendix 2, page 47). Counsel for petitioner further requested the court to rule that the measure of respondent's recovery was the actual cost of reproducing the panels (Record pg. 75, line 11, and Appendix 2, pages 47 and 48).

With respect to the so-called "overhead cost" of $928.56 when counsel for respondent first made inquiry concerning Exhibit "F", the accountant's audit report of respondent's business counsel for petitioner stated that he wished to object to the report as irrelevant and immaterial, not bearing on any element of damage for which defendant could possibly be responsible (Record, pg. 19, lines 3-9 inc., and see Appendix 2, pg. 42). To the offer of Exhibit "F", petitioner objected "as immaterial and irrelevant to any issue before the court, that the general overall business situation and volume of business and the overhead items of rent, officers' salaries, expenses, etc., are wholly immaterial to any issue presented, and have no bearing upon the proper measure of damage and do not in any way measure the actual loss suffered or incurred by plaintiff." These objections were overruled but were allowed as standing objections to all further inquiries concerning the Exhibit (Record pg. 19, lines 21-34, pg. 20, lines 1 to 20, inc., and Appendix 2, pages 42 and 43).

At the close of the evidence, counsel for petitioner requested the trial court to rule that:

> "The cost of doing business on the basis suggested by counsel in his opening statement and by the evidence received over objection is not a recoverable item of damage, is speculative and remote, and in the nature of special damages, not recoverable in this proceeding" (Record, p. 75, lines 12-19, inc., and Appendix 2, pages 47 and 48).

It is apparent that so-called overhead expense items involved no loss or damage to the property itself, and no actual loss to respondent within the meaning of the words, "loss, damage, and injury," as used in the Interstate Commerce Act.

We think it clear that the conclusion of the Iowa Court that the statute authorizes recovery for so-called "overhead expense" ignores the decision of this Court in Illinois Central Railroad Company v. Crail, 281 U. S. 57, 74 L. Ed. 699, a coal dealer sued the railroad for the retail price of 5,500 pounds of coal lost from a carload in transit. He contended that the statute could be satisfied only by an award of damages for the cost of replacing the coal in the retail market at destination. The Court of Appeals for the Eighth Circuit agreed, but this court reversed in an opinion written by Mr. Justice Stone, who said:

> "This contention (consignee's claim) ignores the basic principle underlying common law remedies that they shall afford only compensation for the injury suffered (citing cases), and leaves out of account the language of the amendment which likewise gives only a right of recovery for 'actual loss.'"

Continuing, Mr. Justice Stone pointed out that had the entire car of coal been lost, the cost of replacement would have been the wholesale cost of the car at destination. Respondent there suffered no loss of either overhead, or of profits, since the coal was replaced from carload shipments at the mine price. It seems plain that the Iowa Court has ignored this pronouncement which is closely in point with the case at bar.

In Marcia Dress Frocks, Inc., v. New York Dress Delivery, 29 N. Y. Supp. 2d 322, defendant, a common carrier, lost a number of dress fronts consigned to plaintiff. Plaintiff claimed the remaining portions of the dresses,

which were not shipped, were rendered valueless because of impossibility of procuring matching materials to make new dress fronts. The trial court rendered judgment for the full value of dresses as though completed. In reversing the judgment, the appellate division of the New York Supreme Court said:

> "The defendant, truckman, is liable only for the value of the merchandise lost."

In Meletio Sea Foods Company v. Gordon's Transport, Inc., 191 S. W. 2d 983 (Missouri Court of Appeals), plaintiff shipped 1,250 pounds of a prepared food product, portions of which became contaminated in transit. The invoice price to the purchaser was $13.20 per cwt. The trial court found the actual cost to prepare the product was $10.349 per cwt., but awarded the shipper the invoice price. On appeal, the Missouri court ruled that the actual cost of replacement of the quantity damaged or destroyed was the measure of plaintiff's recovery. The court said:

> "As already pointed out, the federal act gives only a right of recovery for actual loss, and in that respect conforms to the basic principle of the law of damages, which contemplates that the remedy provided in a given case shall only afford compensation for whatever injury is actually sustained." Illinois Cent. R. R. Co. v. Crail, supra; 9 Am. Jur., Carriers, sec. 781.

Continuing its discussion of the rules to be applied, the Missouri court said:

> "While the federal act unquestionably provides that in the event of the carrier's failure to make delivery of any part of a shipment without legal excuse, the holder of the bill of lading is entitled to recover his full actual loss at the point of destina-

tion, we do not understand that the full actual loss for which the carrier is liable may exceed the market value of the lost or damaged goods at destination, or the contract price where the goods were shipped pursuant to a contract of sale, plus whatever incidental damages may naturally and proximately have resulted from the loss or injury complained of. In other words, the act does not contemplate that the shipper shall be permitted to enhance his damages by manufacturing goods, to replace those which had been lost, and afterwards recover the cost of manufacture if such cost exceeds the contract price. But, of course, if he replaces the damaged goods, and the cost of replacement (as in this case) is less than the contract price, then the carrier, under the general law of damages, may show and rely upon such fact in mitigation or reduction of the amount which it must pay in order to afford just compensation.)'

The very recent case of Missouri Pacific Railroad Company v. H. Rouw Company, 258 F. 2d 445, involved an interstate shipment of perishable vegetables, to a commission merchant for sale for shipper's account on the market at destination. A commission was charged to the shipper and deducted from the destination price. The district court, sitting without a jury, granted judgment for the difference in the selling price at destination, and its full market value had it been delivered without damage. The sole question urged on appeal was that the carrier was entitled to a deduction of the commission charged. The United States Court of Appeals for the Fifth Circuit referring to the decision of this court in Illinois Central Railroad Company v. Crail, 281 U. S. 57, 5 S. Ct. 180, 74 L. Ed. 699, said:

"We think that the rigid application of the market value rule here resulted in awarding appellee more

than its actual loss; and there is ground to believe that the court below had the same feeling.

"We are not, however, undertaking to weigh or appraise the evidence as to damages. We hold simply that the judgment appealed from clearly includes the award of some damages to which appellee was not entitled, growing out of the holding of the court below that no deduction should be made of sales commissions and other charges figured on the amount of the difference in market value between delivery in good order and delivery in bad order. Appellee's recovery should be based upon this difference in market values, but not to exceed indemnity."

These authorities, we believe, make it plain that the owner of property damaged in transit is entitled only to his actual loss and no more. It is plain that respondent incurred no **loss** in connection with the rental of buildings, executives' salaries, depreciation of machinery and equipment, or the other items entering into its so-called overhead costs of doing business, because of damage to the panels: These items of expense were neither incurred nor increased because the shipment was damaged. They were simply a part of respondent's cost of doing business which would have been the same irrespective of the damage in transit.

The Iowa court cites in support of its conclusions that purely overhead costs are recoverable as damages, decisions of which Pacific Portland Cement Co. v. Food Machinery and Chemical Corporation, 178 F. 2d 541, is typical. There the parties entered into a contract by which the cement company agreed to purchase all gypsum produced at a certain plant for a period of twenty-five years, but with an "escalator" clause which provided if vendor's cost of production, for any twelve month period increased more than 5% above its average cost of pro-

ducing gypsum in the preceding twelve months, then vendor after notice might increase its selling price, "not to exceed the actual advance in cost of manufacture." The trial court ruled that general and administrative expense was not to be included in determining "cost of manufacture." This conclusion was held erroneous by the Court of Appeals for the Ninth Circuit. That court referred to the fact that there had been no production of gypsum at the defendant's plant prior to the contract and large expenditures had been made to equip the plant for such production, entailing supervisory costs. Also increases had been accepted including general administrative expense prior to suit. The decision of this Court in Standard Oil v. U. S., 107 F. 2d 402, 419, is cited in support of the decision reached.

It is apparent, of course, that inclusion of "overhead costs" in a transaction of the character here under consideration is not supported by the statute or the record before the Iowa Court. Here respondent was entitled to its "full actual loss". It lost nothing by reason of damage to the panels except the out of pocket cost of replacing them. Its "overhead" expense was not increased one penny by the damage to the shipment. No evidence of any increase in general or overhead expense was offered.

We submit that there must be a uniform rule with respect to the measure of recovery under the Interstate Commerce Act when goods are damaged in transit while in the custody of a motor carrier, or any other common carrier. The prior decisions of this Court have laid down the rules which govern under the statute. The Iowa court has added almost one-half to respondent's recovery by inclusion of unwarranted items of damage, therein.

(i) There is appended, hereto, as Appendix I, a copy of the opinion of the Supreme Court of Iowa, which affirmed

the judgment of the trial court, together with a copy of the judgment rendered in the district court of the state of Iowa in and for Polk County.

In Appendix 2, we set forth the following:

1. The petition or complaint of respondent in the trial court,

2. Petitioner's answer,

3. Respondent's amendment to petition,

4. Petitioner's amendment to its answer,

5. Portions of the record with page references thereto showing that petitioner objected to the receipt of evidence with respect to the item of $1,250 discount, allowed by respondent to its purchaser of the panels, and the objections lodged to the offer of Respondent's Exhibit "F",

6. The request for findings of fact and conclusions of law made by respondent at the close of evidence,

7. The findings of fact and conclusions of law of the trial court, and

8. The proceedings in the Supreme Court of Iowa subsequent to the filing of the opinion on April 3, 1962.

Petitioner respectfully prays that this court grant the writ of certiorari to review the judgment of the Supreme Court of the state of Iowa in this cause, and that upon final submission, judgment of the Supreme Court of Iowa be reversed in accordance with the controlling rules of the federal law hereinbefore set forth.

ALDEN B. HOWLAND,
500 Bankers Trust Building,
Des Moines 9, Iowa,
Attorney for Petitioner.

APPENDIX 1.

The opinion of the Iowa Supreme Court reported at 114 N. W. 2d 305-311, inclusive, is copied as follows:

Garfield, Chief Justice.

This appeal involves the measure of recovery from defendant Rock Island Motor Transit Co. for damage to a shipment of aluminum panels. Trial was to the court without a jury. Defendant has appealed from judgment allowing most, but not all, of plaintiff's claim. Errors are assigned in receiving evidence of, and allowing for, two items of damage defendant contends are improper.

Plaintiff's place of business is in Des Moines. It had a contract with Bowers Construction Co., herein called Bowers, to furnish 206 anodized aluminum panels, about 10 feet long and 28 inches wide, for use in constructing a new school building at Montezuma for which Bowers was principal contractor. Plaintiff formed and bent the panels and shipped them by defendant's truck and semi-trailer to Colors, Inc. in Indianapolis to be anodized, i. e., to have a thin protective coating of pure aluminum applied to prolong their life. After the anodizing was done, the return shipment was damaged in transit. The trial court found 153 panels were damaged so they were unfit for use on the job.

As soon as the damaged panels were inspected and counted plaintiff ordered new material to replace them, formed and bent 153 new panels and shipped them to Colors, Inc. to be anodized. When these new panels were received back by plaintiff they did not match in color the panels not damaged in the first shipment. The trial court found it was impossible to match the color of the first panels. Substantial evidence supports this finding.

The first panels were anodized in March, the second shipment in July. A different "batch" of aluminum was used in anodizing the replacement panels. There is undisputed testimony that the only way in which identical color could have been obtained on all the panels was to replace all 206 and that would be more expensive.

The Montezuma school board and Bowers were unwilling to accept the 153 new panels because the color did not match those in the first shipment. However, negotiations between plaintiff, Bowers and the school board resulted in their acceptance at a reduction in cost to the school district of $1250 which was charged to plaintiff. Bowers also charged plaintiff $500 for its extra work in sorting and placing the panels. The trial court allowed plaintiff the cost of replacing the damaged panels, including cost of material, labor, anodizing and freight to and from Indianapolis, and also the $1250 it was compelled to deduct from the contract price. The $500 deduction in favor of Bowers was disallowed. Defendant took and retained possession of the 153 damaged panels from the first shipment. They have a salvage value to defendant of about 13 cents a pound.

Defendant's first two assigned errors complain of the admission of evidence, over its objections, of the reduction in cost to the school district of the $1250 and allowance of this amount to plaintiff.

The court also received evidence, over defendant's objections, of plaintiff's overhead and operating expenses for 1959, the year the panels were furnished. They totaled about 22½ per cent of its direct expense for labor and material. The court allowed plaintiff $928.56, 17 per cent of its direct expense for labor and material in furnishing the replacement panels. Defendant's third and fourth assigned errors are directed to the receipt of this evidence

and allowance to plaintiff of this item. Defendant concedes it is liable for the actual cost of replacing the damaged panels.

I. As the parties agree, defendant's liability for damage to this interstate shipment is governed by subparagraph (11), section 20, 49 U. S. C. A. Defendant is liable, according to the statute, "for the full actual loss, damage, or injury to such property caused by it." See Adams Express Co. v. Croninger, 226 U. S. 491, 506, 33 S. Ct. 148, 57 L. Ed. 314, 320, 44 L. R. A., N. S. 257; 13 C. J. S., Carriers, §§ 263-264; 9 Am. Jur., Carriers, section 778.

[1] The most commonly applied measure of a shipper's loss for injury to the shipment is the difference between its market value at destination if it had not been injured and such value in its injured condition. Gulf, C. & S. F. R. Co. v. Texas Packing Co., 244 U. S. 31, 37, 37 S. Ct. 487, 61 L. Ed. 970, 973; 13 C. J. S., Carriers, § 264a; 9 Am. Jur., Carriers, section 780. See also Parsons v. United States Express Co., 144 Iowa 745, 752, 123 N. W. 776, 25 L. R. A., N. S. 842.

"The test of market value is at best but a convenient means of getting at the loss suffered. It may be discarded and other more accurate means resorted to, if, for special reasons, it is not exact or otherwise not applicable." Illinois Cent. R. Co. v. Crail, 281 U. S. 57, 64-65, 50 S. Ct. 180, 181, 74 L. Ed. 699, 703, 67 A. L. R. 1423, 1426; 9 Am. Jur., Carriers, section 780.

It is not unusual to allow recovery for the reasonable cost of repairing or restoring injured property, especially where the expense of so doing is less than the diminution in value because of the injury. And if the value of the repaired or restored property is less than the value of the property before the injury, such difference in value is also allowed, in addition to the reasonable cost of repair

or restoration. 25 C. J. S., Damages, § 83b, page 599; 15 Am. Jur., Damages, section 124, page 534.

[2] Restatement Torts, section 928, sets forth this rule:

"Where a person is entitled to a judgment for harm to chattels not amounting to a total destruction in value, the damages include compensation for (a) the difference between the value of the chattel before the harm and the value after the harm or, at the plaintiff's election, the reasonable cost of repair or restoration where feasible, with due allowance for any difference between the original value and the value after repairs, * * *." As noted in comment a to this section, if it does not reasonably appear economical to repair or replace the damaged chattel, "the damages are the full value of the subject matter at the time of the tort, less the junk value of the remains."

The rule just stated is approved in Bartl v. City of New Ulm, 245 Minn. 148, 72 N. W. 2d 303, 305, and citations; Hermes v. Markham (N. D.), 60 N. W. 2d 267, 273. Plaintiff cites this rule in support of the trial court's allowance of the $1250. item. Defendant contends its liability is limited to the cost of replacing the damaged panels and that the item just mentioned is not included therein.

[3] II. We think the rule from the Restatement may properly be applied here and that it supports allowance to plaintiff of the $1250. Unless this sum is included in the award to plaintiff it will not be reimbursed for its "full actual loss" as the statute contemplates. Expenditure of the remaining amounts included in the judgment was insufficient to replace the damaged panels in their original condition or value. It is not contended this was through any fault of plaintiff. As previously stated, there is evidence it was impossible to match the color of the first shipment. Thus the court could properly find the

difference in color was also not chargeable to any fault of Colors, Inc. The court found, we think justifiably, the plan plaintiff followed in replacing the damaged panels was the only practical and economical method it could pursue. Certainly it was much less expensive than replacing all 206 panels, so the color would be uniform throughout.

[4] It is true no witness testified directly that value of the 153 replacement panels was $1250 less than the value of those replaced if they had not been damaged in transit. Such testimony might well have been produced and perhaps would have simplified our problem. But we feel evidence that plaintiff was compelled to accept for the replacement panels $1250 less than it would have received for the original ones, if not damaged, is substantial evidence of their reduced value. It is not suggested plaintiff did not negotiate in good faith with the principal contractor and the school board, nor that it did not effect the best possible sale of the replacement panels. Of course it was to its advantage to do so. See Meltzer v. Pennsylvania R. Co., D. C. Pa., 29 F. Supp. 840, 842.

[5] Evidence of the price for which personal property sells at a bona fide sale is competent evidence of its value. Vincent, Albin & Strahl v. Hines, 198 Iowa 1224, 1230, 200 N. W. 1, and citations; Southwestern R. Co. v. Davis, 58 Ga. App. 712, 186 S. E. 899, 902; Garlington v. Ft. Worth & D. C. Ry. Co., 34 Tex. Civ. App. 274, 78 S. W. 368, 369; Rodgers v. Texas & P. Ry. Co., Tex. Civ. App., 172 S. W. 1117; 2 Sutherland on Damages, 4th Ed., section 447, page 1448; 13 C. J. S., Carriers, § 255, 1 (2), page 573, § 264a pages 611-612; 32 C. J. S., Evidence, § 1049a; 20 Am. Jur., Evidence, section 373.

The Garlington and Rodgers cases, supra, hold evidence is receivable that damaged goods were sold for the best

price obtainable and what such price was. See also Gulf, C. & S. F. R. Co. v. Texas Packing Co., supra, 244 U. S. 31, 37, 37 S. Ct. 487, 61 L. Ed. 970, 973.

There is authority that the contract price is also evidence of the value of the goods shipped. Lyons v. Grand Trunk R. Co., 185 Mich. 417, 152 N. W. 88, 89, Ann. Cas. 1917D, 162, 164; 13 C. J. S., Carriers, § 264e, page 615; 9 Am. Jur., Carriers, section 783.

Our conclusion also finds support in Weirton Steel Co. v. Isbrandtsen-Moller Co., 2d Cir., N. Y., 126 F. 2d 593, 594; Meltzer v. Pennsylvania R. Co., supra, D. C. Pa., 29 F. Supp. 840, 842; Cordery v. American Ry. Exp. Co., 5 N. J. Misc. 600, 137 A. 719.

III. Defendant's principal argument in support of its first two assigned errors is that the item of $1250 constitutes special damages which are not recoverable unless at the time the shipment was made it was notified of the facts upon which the claim therefor might be based.

[6] The general rule is that special damages are not recoverable from a carrier for injury to goods shipped unless it had notice or knowledge of the special circumstances from which such damages would flow. Percy v. Chicago, R. I. & P. R. Co., 207 Iowa 889, 892-894, 223 N. W. 879; Alton R. Co. v. Oklahoma Furniture Mfg. Co., 190 Okl. 216, 122 P. 2d 152, 166 A. L. R. 1030, 1032, and Anno. 1034; 13 C. J. S., Carriers, § 267; 9 Am. Jur., Carriers, section 789. There is no evidence defendant was informed, at the time of the original shipment, of the purpose for which the panels were to be used.

[7] However, we are not persuaded the item of $1250 constitutes special damages within the above rule. Certainly the difference between the value of the original shipment if it had not been injured and the value in its

injured condition would constitute general, not special, damages. And we think, in lieu thereof, the reasonable cost of restoring the injured panels, with due allowance for the difference between their original value and the value after restoration, also constitutes general, not special, damages. As stated, defendant concedes liability for the cost of restoration. We are cited to no authority for the proposition that depreciation in value of the restored goods constitutes special damages which are not allowable in the absence of notice.

IV. As previously stated, defendant's remaining assigned errors are directed to the receipt of evidence of plaintiff's overhead and operating expense for 1959, the year the panels were furnished, and the allowance to plaintiff therefor of $928.56, 17 per cent of its direct expense for labor and material in replacing the injured panels. It is argued this item is not shown to be part of the actual loss plaintiff sustained.

Over defendant's objection as irrelevant, immaterial and not bearing on the proper measure of damages, a statement prepared by competent accountants was received in evidence showing plaintiff's operating and overhead expense for 1959. It contains 29 items, with the cost of each. The total is about $225,000. Nearly half this figure consists of officers' salaries and wages other than direct. We understand this means pay of administrative and supervisory personnel. Other principal items include building rent, travel, depreciation on machinery (the largest item aside from officers' and indirect compensation), auto, truck and plane expense, operating supplies and expense, insurance, telephone and telegraph, and moving to a new building.

The statement also includes payroll taxes of about $9500 and payments to employees' welfare and education

funds of about $5300. Insurance totals more than $10,000. The court added to the direct cost of labor for which recovery was allowed 10 per cent of the amount actually paid in wages, to cover payroll taxes, employees' welfare and education funds and workmen's compensation insurance. These items total about 10 per cent of the wages paid. They are duplicated in the statement of overhead and operating expense.

The total of all these items ($225,000) is about 22½ per cent of plaintiff's direct expense for all labor and material during 1959. The allowance to plaintiff of 17 per cent of its direct cost for labor and material in replacing the injured panels is therefore a reduction of substantially 25 per cent from the proportionate cost of overhead (22½ per cent) for the entire year. This, of course, much more than makes up for duplication of the items added to the wages paid for labor. The reduction would also include several other items, such as plaintiff's expense of $6500 in moving into a new building, for which the court may have concluded no allowance should be made.

The vital question raised by these assigned errors is whether plaintiff is entitled to recover, as part of its cost of replacing the injured panels, the above portion of its operating and overhead expense in addition to its direct cost for labor and material on this job. It is a difficult question to be solved with little help from the briefs. If the right answer is in the affirmative, the objection urged to the evidence was properly overruled. We do not understand defendant objects primarily to the extent of the allowance but to any allowance for operating and overhead expense.

[8] We think defendant's liability for plaintiff's "full actual loss", which the federal statute contemplates, in-

cludes not only the direct cost of labor and materials in replacing the injured panels, which is concededly due, but also a fair allowance for the cost of furnishing officers and supervisors, building, machinery, power and other items of operation and overhead. There is substantial evidence to support the amount of the trial court's allowance for these items if plaintiff is entitled to any recovery therefor. We are not called upon to say what, if anything, we would allow if we were triers of the facts or if our review were de novo as in equity cases.

Plaintiff's president testified without dispute, "In connection with doing the work we incurred certain overhead expenses in the operation of machines, such as presses, stamping machines, and electricity. The machinery has to be housed and supervisors and officers to be paid—cost items and overhead which any factory of this nature has." On cross-examination as to operating and overhead expense this witness said, "we spent more proportionately on the Montezuma job than any other we have had, in comparison with volume, due to this mishap in shipment."

Plaintiff's president also testified, "In the contracting business this overhead, * * * and referring to these panels and nothing else our overhead, would be much higher than 22%." Further, "We have had much more supervisory expense on this job than any other since I have been in the business which is not reflected in the labor costs."

The authorities generally distinguish between operating and overhead expense. The former consists of those items inseparably connected with the productive end of the business. The latter consists of charges generally of a nonproductive or indirect nature such as administrative costs incident to the management, supervision or conduct of the capital outlay of the business. Lytle, Campbell & Co. v. Somers, Fitler & Todd Co., 276 Pa. 409, 120 A. 409,

27 A. L. R. 41, 43-44; Mann v. Schnarr, 228 Ind. 654, 95 N. E. 2d 138, 141, 142-143.

" 'Overhead' cannot be defined with precision. 'It may be said to include broadly the continuous expenses of a business irrespective of the outlay on particular contracts.' " Wynkoop Hallenbeck Crawford Co. v. Western Union Tel. Co., 268 N. Y. 108, 196 N. E. 760, 761; Grand Trunk Western R. Co. v. H. W. Nelson Co., 6 Cir. Mich., 116 F. 2d 823, 839.

Under "cost-plus" construction contracts it is generally held the contractor may not include overhead expense as part of the costs unless the contract expressly so provides. An important reason for this seems to be that the parties evidently intended the percentage payment (usually 10 or 15 per cent in addition to labor and material cost) to compensate for the contractor's overhead. Lytle, Campbell & Co. v. Somers, Fitler & Todd Co., supra, and Anno. 27 A. L. R. 48, 50-51; Shaw v. G. B. Beaumont Co., 88 N. J. Eq. 333, 102 A. 151, 2 A. L. R. 122, and Anno. 126; Jensen v. Manthe, 168 Neb. 361, 95 N. W. 2d 699, 703; Nolop v. Spettel, 267 Wis. 245, 64 N. W. 2d 859, 862-864.

We feel these precedents do not conflict with the conclusion herein reached. The Lytle, Campbell & Co. case, supra, observes, "This charge must be determined as each case presents its own peculiar circumstances." (Page 411 of 120 A.)

Several precedents lend support to our decision on this point. Grand Trunk Western R. Co. v. H. W. Nelson Co., supra, 6 Cir., Mich., 116 F. 2d 823, 839, holds overhead expenses of a contractor may be considered in computing damages for breach of a construction contract. "The jury was not required to view appellee's loss as totally separate and apart from its general work." Salaries of ex-

ecutive officers there made up about half the claim for overhead.

United Electrical, R. & M. Workers v. Oliver Corp., 8 Cir., Iowa, 205 F. 2d 376, 387-89, approves recovery for overhead in an employer's action against a labor union for damages for violation of a no-strike clause in the employment contract. The opinion says, "In determining the amount of an admitted damage mathematical accuracy is not required of juries. It is sufficient that a reasonable estimate based on relevant facts is reached" (page 389 of 205 F. 2d).

In Pacific Portland Cement Co. v. Food Machinery & Chemical Corp., 9 Cir., Cal., 178 F. 2d 541, 555, declaratory relief was sought as to the meaning of a contract provision relating to an increase in cost of production of gypsum. After considering the question at length the opinion holds indirect or overhead expense was part of the cost of production. "In the case of corporations operating on a large scale 'it is considered legitimate accounting practice to allocate general overhead expenses to particular operations upon a percentage basis.' (citations)"

Patent infringement cases frequently hold the infringer is entitled to set off a reasonable allowance for overhead as against profits from manufacture of the patented article for which he is liable to the patentee. Sammons v. Colonial Press, 1st Cir., Mass., 126 F. 2d 341, 350-351; Alfred Bell & Co. v. Catalda Fine Arts, D. C. N. Y., 86 F. Supp. 399, 415. See also Levin Bros. v. Davis Mfg. Co., 8th Cir., Minn., 72 F. 2d 163. The Sammons and Alfred Bell cases point out that to be allowable, overhead need not be a direct expense on the particular job—indeed if expense were direct it would not be overhead.

Gordon Form Lathe Co. v. Ford Motor Co., 6th Cir., Mich., 133 F. 2d 487, 500-501, is a patent infringement

case which considers the effect of overhead in determining profits. We quote from the opinion: "It is a matter of common knowledge that all well-managed manufacturing businesses recognize overhead costs as financial outlays expended in the production of an article or process. * * *

"There is probably no single phase of determining cost of manufacturing a device or machine which is more elusive or difficult than the allocation of overhead to a particular article. The impossibility of precise allocation is generally recognized and the law is not so exacting as to require a delicately balanced scientific method of determination which reaches a mathematical certainty. * * *

"The cost of manufactured products consists of the sum of direct costs, that is, direct material and direct labor, plus indirect costs, or manufacturing expense. Because of its indirect and general nature, manufacturing expense cannot be charged directly to each production order as can direct material and direct labor. It must therefore be distributed over production in such manner that each kind of product and each lot of work produced will be charged with its fair share of the indirect expense."

V. The precedents defendant cites in support of its third and fourth assigned errors are not in point. Principal reliance is upon Illinois Central R. Co. v. Crail, supra, 281 U. S. 57, 50 S. Ct. 180, 74 L. Ed. 699, 67 A. L. R. 1423, and Brown Coal Co. v. Illinois Central R. Co., 196 Iowa 562, 192 N. W. 92. In each case a coal dealer sought recovery for a shortage of something over 5000 pounds in a carload shipment of coal at the retail price of coal in small lots. Neither plaintiff had resold the coal but intended merely to add it to his stock. Both decisions hold the measure of the loss was the wholesale market price at destination rather than the retail price of the small quantity in the shortage. In each case the plaintiff was able

to purchase other similar coal at wholesale. Each plaintiff sought to recover from the railroad the profit he would have earned had he sold at retail the coal which was short, without deduction for any of the expense that would have been incurred in such sale, but which in fact was not incurred.

The soundness of the cited decisions is scarcely open to question. See Annos. 50 A. L. R. 1467, 67 A. L. R. 1427; 9 Am. Jur., Carriers, section 784. Plaintiff here makes no claim for any profit from the injury to the panels. It seeks to recover only its loss therefrom. The judgment appealed from does no more than compensate for such loss and no profit is included therein.

Affirmed.

All Justices concur.

The judgment of the trial court was as follows:

JUDGMENT ENTRY.

"Now on this 10th day of March, 1961, this matter comes on for final hearing and determination the plaintiff Conditioned Air Corporation, appearing by H. M. Coggeshall, its attorney and the defendant, Rock Island Motor Transit Company appearing by A. B. Howland, its attorney.

"And now upon the issues joined, and the court having heard the evidence and arguments of counsel and the cause having been duly tried and submitted, and the court having heretofore filed herein its findings of fact and conclusions of law which by this reference are made a part hereof, and the court being fully advised in the premises;

"It Is Therefore Ordered, Adjudged and Decreed that the plaintiff, Conditioned Air Corporation, have

and recover judgment against the defendant, Rock Island Motor Transit Company, in the amount of $7,640.67 together with five (5) per cent interest per annum thereon from and after July 15, 1959 until paid.

"It Is Further Ordered, Adjudged and Decreed that the panel salvage now in the possession of the defendant is the property of the defendant.

"It Is Further Ordered, Adjudged and Decreed that judgment for the court costs be entered against the defendant.

s/ Ray C. Fountain,
Judge."

(R. 92, lines 26-34; R. 93, lines 1-27.)

APPENDIX 2.

The following portions of The Record are herewith reproduced to show the pleadings filed in the trial court, the findings of fact, and conclusions of law, of that court, together with the objections to evidence offered and received upon the trial, requests for findings and conclusions with respect to questions of law presented by this Petition for Certiorari:

"On April 25, 1960, plaintiff filed in the office of the Clerk of the Polk County District Court the following:

PETITION.

"Comes the plaintiff and for cause of action states:

1. That the plaintiff is a corporation organized and existing under the laws of the State of Iowa.

2. That the defendant was at all times material hereto a common motor carrier operating a fleet of trucks for the transportation of property for compensation in interstate commerce.

3. That on or about the 16th day of March, 1959, Colors, Inc., of Indianapolis, Indiana, delivered to Daum Freight Lines aluminum siding owned by plaintiff, for transportation to plaintiff at Des Moines, Iowa; copy of bill of lading issued is attached and made a part hereof and marked Exhibit "A".

4. That the said aluminum was delivered to Daum at Indianapolis, Indiana, in good condition for shipment to the plaintiff.

5. That defendant, pursuant to said bill of lading, transported said aluminum and delivered it to plaintiff at Des Moines, Iowa.

6. That the defendant was so negligent in handling and transporting said aluminum that a large portion

thereof was destroyed except for salvage and a portion thereof was damaged, all to plaintiff's damage in the sum of $9,566.00.

7. The portion so destroyed except for salvage consisted of 165 10′ x 2′ aluminum outside wall panels and metal trim; the portion of said lot damaged consisted of 18 aluminum outside wall panels.

8. That the said salvage has been delivered to, received and accepted by the defendant and is and has been in its possession.

9. That plaintiff paid to defendant its freight bill for said shipment in the amount of $229.08.

"Wherefore plaintiff prays for judgment against the defendant in the sum of $9,795.08 and interest from March 19, 1959" (R. 3, lines 1-34; R. 4, lines 1-19). . .

"On May 26, 1960, within the time allowed by the Court, Rock Island Motor Transit Company filed the following:

ANSWER.

"Defendant for answer to the petition of plaintiff states and shows the Court as follows:

1. This defendant admits the allegations of paragraph 1 of plaintiff's petition.

2. This defendant admits that it was at all times material a certificated motor carrier and was the holder of certain certificates issued by the Interstate Commerce Commission authorizing it to operate as a motor carrier between Des Moines, Iowa, and Chicago, Illinois.

3. This defendant admits that on or about March 16, 1959, a shipment of aluminum siding was billed by Colors, Inc., of Indianapolis, Indiana, to plaintiff

at Des Moines, Iowa, and that said shipment was routed via Daum Freight Lines from Indianapolis, Indiana, to Chicago, Illinois, thence to Des Moines, Iowa, via Rock Island Motor Transit Company. This defendant is without information as to whether the copy of the bill of lading attached as Exhibit "A" to plaintiff's petition is a true copy of the bill of lading issued, and, therefore, denies same.

4. This defendant denies the allegations of paragraph 4 of plaintiff's petition.

5. This defendant admits that it transported the shipment referred to in the foregoing paragraphs between Chicago, Illinois, and Des Moines, Iowa, and tendered same to plaintiff at Des Moines, Iowa. This defendant denies that said shipment was delivered to plaintiff and alleges that plaintiff without good cause refused to receive certain portions of said shipment.

6. This defendant denies each, all and every allegation set forth in paragraph 6 of plaintiff's petition.

7. This defendant denies each, all and every allegation set forth in paragraph 7 of plaintiff's petition.

8. This defendant admits that certain portions of the shipment improperly rejected by plaintiff are in its possession.

9. This defendant admits the allegations of paragraph 9 of plaintiff's petition.

"Wherefore, having fully answered the petition of plaintiff, defendant, Rock Island Motor Transit Company, prays that the same be dismissed" (R. 4, lines 24-34; R. 5, lines 1-34; R. 6, lines 1-13).

"On the 5th day of January, 1961, appellee filed the following:

AMENDMENT TO PETITION.

"Comes the plaintiff and leave of court having been obtained amends its petition by adding paragraph 10 as follows:

10. That despite diligence plaintiff was unable to fully replace or repair said panels and trim in that the coloring thereof could not be duplicated, all to plaintiff's special damage in the amount of $1,750.00.

"Wherefore plaintiff prays as in its petition" (R. 6, lines 27-34; R. 7, lines 1-7).

"On February 20, 1961, appellant filed the following:

AMENDMENT TO ANSWER.

"Comes Now defendant, Rock Island Motor Transit Company, and amends its answer heretofore filed herein to make the same applicable to the amendment to plaintiff's petition filed on or about January 5, 1961, and thereupon states and shows the Court as follows:

"This defendant admits that plaintiff was required to and did make an adjustment in the contract price for the panels to be supplied to the Montezuma Community School District but alleges that such items are not proper damages recoverable in this case and that this defendant is in no manner responsible for or liable for any loss sustained by plaintiff in said respects.

"Wherefore, having fully answered the petition of plaintiff as amended, defendant, Rock Island Motor Transit Company, prays as in its original answer" (R. 7, lines 9-33).

The following occurred during the direct examination of Ray Cummings, president of the Conditioned Air Corporation:

"I had occasion to make a bid in connection with a job involving the construction of a schoolhouse at Montezuma, Iowa, in either 1958 or 1959. The bid was accepted by the contractor.

"Exhibit A is the acceptance of our proposal made to the Bowers Construction Company for performing this work in the amount of $15,870. There were three parts to the work under this contract. One was to furnish aluminum fascia, or trim, as you have called it. The other was to furnish these exterior panels as displayed here in the courtroom, and the third was to furnish insulation, or backing, to these panels making up the total of our contract.

"Mr. Coggeshall: We offer and introduce in evidence Exhibit A.

"Mr. Howland: Objected to as irrelevant and immaterial, having no bearing on any action of damages before the Court for consideration in this proceeding, or other matters in this proceeding, and not the proper measure of damage.

"Mr. Coggeshall: I will concede that the measure of damage, as such, is not the contract price or any differential in connection therewith, but in connection with our claim of special damages we need to establish a base to show the reasonableness of the deductions made by the contractor and in that connection the contract price is relevant" (R. 12, lines 10-34; R. 13, lines 1-11).

"The Court: Overruled.

"Mr. Coggeshall: Can it be agreed Exhibit F is an audit prepared by Peat, Marwick, Mitchell & Co., for the year 1959 for the plaintiff?

"Mr. Howland: It is agreed that Exhibit F is an audit of the business and financial transactions of the plaintiff corporation for the year ending December 31, 1959, prepared and transmitted to the witness, as

president of the plaintiff, by Peat, Marwick, Mitchell & Co., certified public accountants.

"Mr. Coggeshall: May we further agree that the accountants are competent?

"Mr. Howland: Well, there is no question as to the competency of the accountants, but if the exhibit is to be offered in evidence, I want to object to it as irrelevant and immaterial, not bearing on any element of damage which the defendant could possibly be responsible for.

"The Witness: In connection with doing the work our company incurred certain overhead expenses in the operation of machines, such as presses, stamping machines, and electricity used in the course of the work. The machinery has to be housed, and there are supervisors and officers to be paid—cost items and overhead which any factory of this nature has.

"Mr. Coggeshall: I would like to introduce Exhibit F at this time.

"Mr. Howland: The offer of Exhibit F is objected to as immaterial and irrelevant to any issue before the Court for determination, that the general over-all business situation and the volume of business and the overhead items of rent, general officers salaries, expenses, etc., are wholly immaterial to any issue presented in this case and have no bearing upon the proper measure of damage and do not in any way measure the actual loss suffered or incurred by plaintiff in connection with this transaction.

"The Court: Overruled. It may be admitted.

"Q. Was the general relationship of overhead to direct expense pretty constant throughout 1959?

"Mr. Howland: May the same objections made to Exhibit F stand without repetition to any inquiries with respect to the subject of overhead expense or allocation of overhead expense?

"The Court: It may.

"Mr. Coggeshall: We will agree to that" (R. 18, lines 20-34; R. 19, lines 1-34, R. 20, lines 1-20).

"Q. Looking at Exhibit F can you tell us during the year 1959 the direct expense in doing business of your firm, I mean the direct out of pocket expense including overhead?

"A. Our total out of pocket cost of doing business is the sum of two figures, $898,128 plus $41,863, which appears on page 3 of the exhibit. They are carried under the items, 'Direct costs on completed contracts, $898,128.84,' and 'Cost of sales, $14,863.01'. Our overhead expense for the year 1959 was $224,841, or a percentage of overhead to direct expense of 22½%. Exhibit F contains a schedule showing a breakdown of the overhead expense of $224,841.84, which appears on page 8 of Exhibit F, including items of officers' compensation, salaries and wages—other than direct —warehousing expense, rent expense, outside engineering services, traveling expense, and depreciation. The depreciation shown is on machinery only, not buildings. The building we occupied was rented, and the rent expense constitutes the rental the company paid for the building. Other items are included" (R. 21, lines 11-34; R. 22, lines 1-6).

"Q. And shortly thereafter or about that time did you have occasion to have a conference or reach a settlement with the contractor on the job?

"Mr. Howland: Objected to as immaterial and incompetent, no bearing on any issue before the Court, not the proper measure of damages, and no foundation laid for any claim of that type and character.

"The Court: Overruled."

(Exhibit G marked for identification.)

"Q. Did you handle the matter for the plaintiff of settling with the contractor?

"A. Yes.

"Mr. Howland: May we have the same objection stand without repetition as to further inquiries with respect to the exhibit or any settlement made with the contractor?

"The Court: It may so stand.

"The contractor on the job was Bowers Construction Company. Mr. Richard Bowers is the owner. We received a communication from Mr. Bowers which is identified as Exhibit G. The letter was sent to me in relation to settlement with the school board. I know the final settlement which we made with the contractor. The settlement was this: Because of the replaced panels being a different color, but being mechanically sound, the School Board objected to the architectural appearance, and so did the architect, and it being a question of the opening of school in September we made a settlement with them whereby Bowers Construction Company gave the school board $1250 to accept the variation in color, and we gave the Bowers Construction Company the $1250 to give to the school board and $500 for extra labor in handling and sorting of the panels in order to reduce the objections to variations in color. The cost was $500 plus $1250, making a total of $1750. The reason for the variation in color is that, like carpet out of a different dye vat, maybe it is hard to see, but on a building in the bright sunlight you can notice it, and the only way to keep true color all the way through would be to replace all the sheets on the building, which we did not do and which would have been more expensive.

"Mr. Howland: I move to exclude the answer of the witness in its entirety on the grounds urged in the objection, and further that the witness is giving hearsay testimony consisting of opinions and conclusions;

that no foundation has been laid for the introduction of any such evidence to make it competent and material, and that with respect to conversations with the contractor and conversations of the contractor with the school board the testimony constitutes unadulterated hearsay evidence; there has been and will be no opportunity afforded for cross-examination, and the testimony is therefore wholly incompetent and improper.

"The Court: Overruled.

"Q. Do you know what Exhibit G is?

"A. Yes, I know what Exhibit G is, and I also was in on the negotiations with Bowers and the school board and Mr. Ed McNeal, president of the school board, so it was firsthand information that I have.

"Mr. Howland: I again renew the motion to strike the statements as hearsay and incompetent.

"The Court: Overruled.

"Exhibit G contains the settlement as I have expressed it to the Court" (R. 23, lines 19-34; R. 24, lines 1-34; R. 25, lines 1-34; R. 26, lines 1-13).

On cross-examination of this witness, he testified as follows:

"On one sheet in Exhibit F, designated page 8, schedule II, 'Statement of operating expenses for the year 1959,' the total operating expense was shown as $224,841.84. Included in that schedule on page 8 of Exhibit F is an item of rental expense that was the rental of the building that the company occupied with its shop and offices at a fixed monthly rental. That was a liability of the corporation irrespective of the amount of business that it did. That is a part of what I have included in operating expense here. The rent would have been the same whether we ever had this contract for the school job at Montezuma or not.

There is a charge of outside engineering service of $1,000. I can't tell you what the nature of that was, but we do employ outside engineering at times. That had no connection, as far as I know, with the Montezuma schoolhouse job. We have an item of travel expense for the year 1959 of $10,840.85. I do not know how much of that represented traveling expense incurred in connection with the Montezuma schoolhouse job, but I would like to answer your question with this qualification, that we have spent more proportionately on the Montezuma school job than any other job we have had in comparison with the volume due to this mishap in shipment. I have no idea what it amounts to. The depreciation item of $17,854.85 is depreciation on machinery and equipment for the year. We wouldn't have been able to do the Montezuma school job without the machinery. The depreciation which would not have been incurred had we not had the Montezuma school job and similar jobs like it, because that was on the equipment used in the Montezuma school job. We didn't buy any equipment to do this job with specifically. We take our depreciation on a flat basis, which is recognized by the Internal Revenue Department" (R. 28, lines 33-34; R. 29, lines 1-34; R. 30, lines 1-9).

"There is an item of professional fees of $1,984 for the year 1959. That includes legal fees and other normal professional fees. The company probably paid fees to accountants in addition to legal fees. The $224,841.84 was our overhead cost and constituted 22½% of our direct costs on completed contracts, which amounted to $898,128.84 and costs of sales of $41,863.01. We added the two figures together and took the proportion that this 224,000 odd dollars bore to those figures. Page 8 of the schedule shows an item of moving expense, $6,409.23. That was expense

of moving equipment when we moved from the New York Avenue location out to the new factory on Bell Avenue. That was probably actually done after the Montezuma job had been fully completed" (R. 31, lines 2-20).

At the close of all the evidence, counsel for petitioner made the following request for findings of fact and conclusions of law:

"Mr. Howland: At this time, at the close of the evidence, we ask the Court to render his decision in writing, finding the facts and stating his conclusions of law with respect to any recoverable items of damage shown by the evidence; in that connection we ask the Court, as a matter of law, to state in his conclusions that the items totaling $1,750, claimed by plaintiff as a part of the damages sustained, constitute special damages, and that the evidence is wholly insufficient to establish that the defendant is in any manner liable for such loss. We further ask the Court to incorporate in his conclusions of law a statement that as to 27 of the panels which are in issue, that no substantial damage thereto was sustained, and that the same were improperly rejected by plaintiff and should have been retained. We ask further that the Court find and determine as a fact that 66 of the panels could have been reanodized and repaired at a proportionate cost, as testified to by the witness Borg, and that 66 panels were in fact improperly rejected and should have been reanodized rather than new material ordered and additional labor expended to reproduce the panels. We further ask the Court to include in his statement of conclusions that the measure of damage to which the plaintiff is entitled is the actual cost of reproducing the panels which were properly rejected, and that the cost of doing business on

the basis suggested by counsel in his opening statement and by the evidence received over objection is not a recoverable item of damage and is speculative and remote and in the nature of special damage, not recoverable in this proceeding" (R. 74, lines 14-34; R. 75, lines 1-19).

The Record shows the following with respect to Exhibit "F":

> "**Exhibit F** is an accountants' report of Peat, Marwick, Mitchell & Co., Certified Public Accountants, Des Moines office, consisting of a cover sheet, transmittal letter, a balance sheet statement of financial condition as of December 31, 1959, referred to as Exhibit "A" thereto, a statement of earnings and retained earnings of Conditioned Air Corporation for the year ended December 31, 1959, with comparative figures for 1958, which is referred to as Exhibit "B", notes numbered (1) to (4), inclusive, to financial statements, and a schedule of contracts in progress showing assets and liabilities with respect thereto, and a statement of operating expenses for the year ended December 31, 1959, with comparative figures for 1958. The statement of operating expenses is reproduced as follows" (R. 82, lines 1-21):

Conditioned Air Corporation.

Statement of Operating Expenses

Year ended December 31, 1959
with comparative figures for 1958

	1959	1958	Increase (Decrease)
Officer's compensation	$ 24,000.00	17,200.00	6,800.00
Salaries and wages—other than direct	85,875.02	59,714.77	26,160.25
Warehousing expense		932.68	(932.68)
Rent expense	7,840.00	7,920.00	(80.00)
Outside engineering services	1,000.00	10,127.00	(9,127.00)
Traveling expenses	10,840.85	11,436.33	(595.48)
Depreciation	17,854.85	13,226.94	4,627.91
Payroll taxes	9,462.68	9,159.72	302.96
Auto, truck, and plane expense	11,526.43	7,041.96	4,484.47
Local and county taxes	754.72	614.88	139.84
Operating supplies—sheet metal	$ 6,043.42	3,995.71	2,047.71
Advertising	710.59	752.16	(41.57)
Insurance	10,216.67	6,178.75	4,037.92
Operating supplies—general	3,867.80	8,950.48	(5,082.68)
Interest expense	2,164.89	1,550.88	614.01
Telephone and telegraph	5,002.89	3,749.73	1,253.16
Employer's welfare fund	4,885.21	7,103.44	(2,218.23)
Employees' education trust	392.89	871.46	(478.57)
Heat, light and water	2,959.69	1,944.28	1,015.41
Office supplies and expense	1,280.65	1,177.73	102.92
Professional fees	1,984.66	1,180.77	803.89
General expense	2,660.38	1,876.44	783.94
Service expense	1,992.84	271.70	1,721.14
Bad debts	128.53	319.64	(191.11)
Insurance—life	10.82	(10.78)	21.60
Dues and subscriptions	771.92	242.25	529.67
Postage	357.57	293.58	63.99
Contributions	242.87	117.50	125.37
Operating expense—scrap metal	3,503.77	1,809.75	1,694.02
Moving expense	6,509.23		6,509.23
	$224,841.84	179,749.75	45,092.09

The findings of fact and conclusions of law of the trial court were as follows:

"The above entitled cause came on for trial before the Court without the intervention of a jury, the plaintiff appearing by its Attorney, Harris Cogge-

shall, and the defendant appearing by its Attorney, A. B. Howland; and the Court having heard the evidence introduced and stipulations made, examined the exhibits and the authorities cited, and being now fully advised in the premises makes the following:

FINDINGS OF FACT.

1. That on or about November 17, 1958, the plaintiff's proposal on the sheet metal and insulated panel work for the Montezuma, Iowa high school addition was accepted by the Bowers Construction Company, the primary contractor, for the agreed sum of $15,870.

2. That the plaintiff fabricated a number of aluminum panels and shipped them to Indianapolis, Indiana, to be anodized.

3. That on or about the 19th day of March, 1959, the shipment of panels was returned to the plaintiff by the defendant, but the shipment was in bad order.

4. That 153 of the panels were damaged by cracking, denting, scraping and rubbing off of the anodizing so that they were unfit for use on said high school addition; and the plaintiff to comply with his contract had to refabricate 153 new panels and have them anodized.

5. That said 153 damaged panels were returned by the plaintiff to the defendant, who still has possession of the same.

6. That in anodizing aluminum panels as in this case, it is impossible to secure identical coloration; and because of the variation in color in the two processes of anodizing the sum of $1250 was deducted from the contract price.

7. That the materials for the replacement panels were purchased from Robinson Brothers at a cost of $2840.31; that there was paid to Jewett Lumber Company for crating materials for shipping, $99.46; that the freight charges paid on said panels from Des Moines to Indianapolis amounted to $221.33, and freight charges paid from Indianapolis to Des Moines, 153 panels, $143.20; that there was paid to Colors Inc., as an anodizing charge on 153 panels, $830.17 plus c. o. d. fee of $5.01; transportation charges to Watson Bros., $3.84.

8. That plaintiff's actual labor cost in processing replacement panels was: paid to employees, $1198.90; paid unemployment tax, social security tax, workmen's compensation, union welfare, etc., a total of 10% of the above wages, or $119.89.

9. That the fair and reasonable overhead charges for the use of the machinery, rent, management salaries, etc., were in the reasonable sum of 17% of the above items, or a total sum of $928.56.

10. That the plaintiff has failed to sustain by a preponderance of the evidence its allegation that it used materials from its own stock in replacing said panels in the sum of $318.79.

11. That the plaintiff has failed to sustain by a preponderance of the evidence that the additional deduction of $500 made by the Bowers Construction Company for extra work performed by its personnel in sorting and placing the panels was related to or had any connection with the 153 replacement panels.

12. That the plaintiff is entitled to interest on the sums due it at legal rate from July 15, 1959.

13. That the plan followed by the plaintiff in replacing the 153 damaged panels by new panels was the only practical and economic method it could have followed.

CONCLUSIONS OF LAW.

1. The federal law provides that the carrier in such a situation as this is liable to the plaintiff for any loss, damage or injury to the property covered by the bill of lading, and in that respect conforms to the basic principle of the law of damages which contemplates that the remedy provided in a given case shall only afford compensation for whatever injury is actually sustained.

2. In this case the actual loss is to be ascertained from the special circumstances of the case rather than by rigid adherence to some fixed rule or formula, such as value of the property at the point of destination at the time delivery should have been made.

3. The important factor in this case is that the plaintiff upon the happening of the loss had to replace the damaged panels, and even then was compelled to take a $1250 discount off its contract price because of the differences in color; consequently, the plaintiff is entitled to recover its actual loss, which was obviously the cost of replacing the damaged panels plus the incidental expenses, including: cost of materials, $2,840.31, and crating, $99.46; transportation charges to Indianapolis and return, $368.37; anodizing charges and c. o. d. fee, $835.18; labor costs and overhead, $2247.35; loss on account of changes in color, $1250.00, for a total of $7,640.67, with interest at 5% from July, 1959.

4. That as the defendant has accepted and retained the damaged 153 panels, it is entitled to dispose of

them and to retain any sums received as salvage therefor.

"The plaintiff may prepare a judgment in accordance with the Findings and Conclusions, submit it to the defendant for approval as to form, and to the Court for signature.

"Both parties except.

"Signed this 8th day of March, 1961.

s/ Ray C. Fountain,
Judge."

(R. 88, lines 19-34; R. 89, lines 1-34; R. 90, lines 1-34; R. 91, lines 1-34; R. 92, lines 1-21.)

This cause was submitted on abstract and argument with oral arguments of counsel for both sides to the Supreme Court of Iowa on February 8, 1962.

Thereafter there was filed on April 3, 1962, the opinion of the court printed herein as Appendix 1, and the following journal entry was made in the official Journal of the court.

"April 3, 1962.

"In this cause, the Court being fully advised in the premises, filed their written opinion affirming the judgment of the District Court. It is therefore considered by the Court that the judgment of the Court below be and it is hereby

Affirmed."

Thereafter and within the time allowed by the statutes and rules of the Iowa Supreme Court, there was filed appellant's

PETITION FOR REHEARING.

Said petition for rehearing was predicated on the fact that the $1,250 discount, referred to in the opinion of the court,

was "special" or "consequential" damages, not recoverable in the absence of notice to the carrier that such damages would result in loss or damages or injury to the panels in transit, and that the Federal statute (Section 20, paragraph 11, Interstate Commerce Act), which provides that a carrier "shall be liable for any loss, damage, or injury to such property, does not impose liability for general overhead expenses of a business enterprise of a shipper, in no way connected with replacement of articles lost or damaged in transit."

Thereafter, and on May 8, 1962, the following order was entered by the Supreme Court of Iowa:

"Rehearing Denied."

There is filed herewith a certified copy of the record on appeal, order and proceedings on submission, opinion, and judgment affirming the Polk County, Iowa, District Court, appellant's petition for rehearing and order overruling petition for rehearing, dated May 8, 1962.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 278

ROCK ISLAND MOTOR TRANSIT COMPANY,
Petitioner,

vs.

CONDITIONED AIR CORPORATION,
Respondent.

RESPONDENT'S BRIEF
In Opposition to Petition for Writ of Certiorari.

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OPINION BELOW.

The opinion of the Supreme Court of Iowa is reported at 114 N. W. 2nd 304, and is not, as yet, published in the official Iowa reports. Petition for rehearing was denied.

QUESTIONS PRESENTED.

The questions presented, as asserted by petitioner, fail to express the true issues.

At the trial and prior thereto the petitioner stipulated and conceded that it was liable for the cost of replacing

that portion of the lot of panels which had been destroyed. At the bottom of page 5 of the petition for the writ, petitioner so admits. Therefore question 1 is:

Where a lot of aluminum panels of a single color is partially destroyed in shipment, and where the carrier stipulates it is liable for the cost of restoring to the lot the panels destroyed, and where the shipper despite diligence is unable to fabricate new panels of the same color as that of the original lot, is the carrier liable for the loss occasioned by such difference in color?

As for the second question, petitioner incorrectly includes in its statement of the questions the assertion that the overhead expenses were "not incurred or increased by the necessity for the replacement". Rather, question two is:

Where pursuant to an agreement that the carrier will be liable for the cost of fabricating and replacing panels damaged in shipment, and where the shipper supplies therefor electric power, use of machinery, supervisory services, etc., which expenses are shown on the shipper's books as indirect or overhead expense, is the carrier liable for such expense if fairly computed?

STATEMENT OF THE CASE.

Petitioner's statement of the case is sufficiently accurate subject to making it clear that there was evidence (as shown by the opinion of the Iowa Supreme Court appearing on page 23 et seq. of petition) that certain of the so-called overhead expenses were actually incurred by respondent in fabricating the replacement panels.

REASON FOR DENYING THE WRIT.

In an effort to elevate the case to the level of a question inviting the attention of this Court, petitioner phrases the questions presented as involving an application of Section 20, Par. 11, of the Interstate Commerce Act. But this is not so.

As to question one, the problem involves only fixing the measure of recovery where the carrier agreed it was liable for the cost of replacing the portion of the lot damaged and where the shipper was unable in fabricating to obtain the same color as the original lot. Thus, as pointed out by the Iowa Supreme Court, the rule of Sec. 928 of the Restatement of Torts takes effect. Such rule is:

> "Where a person is entitled to a judgment for harm to chattels not amounting to a total destruction in value, the damages include compensation for (a) the difference between the value of the chattel before the harm and the value after the harm or, at the plaintiff's election, the reasonable cost of repair or restoration where feasible, with due allowance for any difference between the original value and the value after repairs, * * *."

As to question two, there is presented only the problem of determining as a matter of damages whether respondent was entitled to recover its incurred overhead expense (power, use of machines, supervisory services, etc.) in fabricating the replacement panels. This involves no federal matter.

In this connection, it is curious that petitioner states on page 21 of its petition that respondent's overhead expense "was not increased one penny by the damage to the shipment". Where petitioner concededly was liable for the respondent's replacement costs, any computation

of such costs necessarily included power, use of machines, supervisory services, etc. And such items under respondent's accounting method were a part of so-called overhead. There is no foundation whatever for petitioner's statement.

Petitioner cites the famous case of **Illinois Central Railroad Co. v. Crail**, 281 U. S. 57, 50 S. Ct. 180, 74 L. ed. 699, and kindred cases. They simply hold that "full actual loss" under Section 20, Par. 11 of the Interstate Commerce Act, does not include profit or loss not incurred. Respondent neither claimed nor was awarded profit or expense not incurred.

CONCLUSION.

Upon the record in this cause it is submitted that the petition for writ of certiorari be denied.

Respectfully submitted,

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